Supreme Court, U. S.
FILED

No. 80-110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Petitioners,

vs.

BACHE HALSEY STUART SHIELDS, INCORPORATED, A DELAWARE CORPORATION (FORMERLY KNOWN AS BACHE HALSEY STUART, INC. AND ALSO FORMERLY KNOWN AS BACHE & CO., INCORPORATED),

Respondent.

BRIEF FOR RESPONDENT, BACHE HALSEY STUART SHIELDS, INCORPORATED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The case does not present any questions worthy of review by this Court.

The only questions presented by this case are:

1. Whether the petition should be denied because the decision of the court below is correct and in conformity with the decisions of this Court and of other courts.

2. Whether the petition should be denied because the decision of the court below is correct and in conformity with the accepted and usual course of judicial proceedings.

3. Whether the petition should be denied because the issues raised are barred in whole or in part under the doctrines of *res judicata* and waiver.

4. Whether the petition should be denied because the decision below affects only the private parties to this litigation, and does not involve any important principle of law or matter of public policy.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Statement of the Case	2
Preliminary Statement	2
History of the Prior Litigation	2
The First Lawsuit-Tamari I	3
The Second Lawsuit-Tamari II	4
The Third Lawsuit-Tamari III	4
The Present Case	5
The Complaint	5
Bache's Motion to Dismiss and the District Court's Order	9
Tamaris' Motion to Vacate	10
The Decision of the Court Below	11
Reasons for Denying the Writ	14
I. The Decision of the Court Below on the Issue of Claimed Arbitrator Partiality Is Correct and in Conformity with the Decision of This Court and of Other Courts	14
A. Tamaris' Argument That the Arbitrators Were Partial Because an Arbitrator's Employer Hired a Bache Employee Who Testified at the Arbitration Hearings Lacks Merit	14
1. Unlike *Commonwealth* and *Sanko*, the Arbitrator Had No Relationship to a Party. If One Existed Here, It Was Trivial at Best	15
2. Unlike *Commonwealth Coating* and *Sanko*, the Relation at Issue Here Was Promptly Disclosed	18
3. Unlike *Commonwealth Coatings* and *Sanko*, the Challenged Arbitrator Here	

Withdrew and Did Not Participate in Making the Award 19

B. Tamaris' Argument That the Arbitrators Had a Vested Interest in Determining Whether They Voluntarily Submitted to Arbitration Lacks Merit 20

1. Tamaris' Argument Is Not Supported by Allegations of the Complaint and Was Not Raised in the District Court .. 20

2. Tamaris' Argument Is Barred by Res Judicata 20

3. Tamaris' Waived Any Purported Partiality 21

4. An Appearance of Partiality Cannot Be Inferred from the History of Commodities Futures Trading Commission Regulation 180.3 24

II. Tamaris' Argument That the Court Below So Departed from Accepted Court Procedures in Dismissing Their Complaint for Failure to State a Claim as to Call for the Exercise of This Court's Power of Supervision Lacks Merit 26

A. The Court Below Concluded Tamaris Failed to State a Claim Viewing the Allegations Most Favorably to Tamaris 26

B. It Is Settled Law That an Exhibit to a Complaint Controls Inconsistent Allegations ... 27

C. The Holding of the Court Below Does Not Turn on the Findings Tamaris Complain of 28

D. The Dismissal of Tamaris' Complaint Did Not Depart from the Accepted and Usual Course of Judicial Proceedings 29

III. The Issues Raised Are Barred by Res Judicata and Waiver 29

Conclusion 30

Table of Authorities

Cases

Andros Compania Maritima, S. A. v. Marc Rich & Co., A. G., 579 F. 2d 691 (2nd Cir. 1978) 18, 22

Angel v. Bullington, 330 U. S. 183 (1946) 21

Associated Builders Inc. v. Alabama Power Company, 505 F. 2d 97 (5th Cir. 1974) 27

Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591 (1948) 21

Commonwealth Coatings Corporation v. Continental Casualty Company, 393 U. S. 145 (1968) 14, 15, 16, 17, 18, 19, 21

Garfield & Co. v. Weist, 432 F. 2d 849 (2nd Cir. 1970), *cert. denied*, 401 U. S. 940 (1971) 22

Ilios Shipping and Trading Corp. v. American Anthracite & Bituminous Coal Corp., 148 F. Supp. 698 (S. D. N. Y. 1957) 18

In re Woodmar Realty Co., 294 F. 2d 785 (7th Cir. 1961) 27

Isaacson v. Hayden, Stone Inc., 359 F. Supp. 1050 (S. D. N. Y. 1973) 18

Oversees Private Inv. Corp. v. Anaconda Co., 418 F. Supp. 107 (D. C. 1976) 18

Ohio & Mississippi Railway Company v. McCarthy, 96 U. S. 258 (1878) 29, 30

Olpin v. Ideal National Insurance Company, 419 F. 2d 1250 (10th Cir. 1969), *cert. denied*, 397 U. S. 1074 (1970) 27

Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F. 2d 1268 (2nd Cir. 1971) 18, 19, 21

Sanko S. S. Co. Ltd. v. Cook Industries Inc., 495 F. 2d 1260 (2nd Cir. 1973) 14, 15, 17, 18, 19

Tamari v. Bache & Co. (Lebanon) S. A. L., 565 F. 2d 1194 (7th Cir. 1977), *cert. denied*, 435 U. S. 905 (1978) 4, 20, 21, 23, 25

Tamari v. Conrad, 552 F. 2d 778 (7th Cir. 1977) 4

United States Wrestling Federation v. Wrestling Division of the A. A. U. Inc., 605 F. 2d 313 (7th Cir. 1979) 18

Usery v. Turner Elkorn Mining Co., 428 U. S. 1 (1976) .. 20

Weade v. Dichmann, Wright & Pugh, 337 U. S. 801 (1948) 20

Statutory Provisions

Commodity Exchange Act, 7 U. S. C. § 1 et seq. 4, 21

Commodity Exchange Act, 7 U. S. C. § 7(a)(11) 24

Commodity Futures Trading Commission, Regulation 180.3 ..... 20, 21, 24, 25

Federal Arbitration Act, 9 U. S. C. § 2 ..... 23, 25

Federal Arbitration Act, 9 U. S. C. § 10 29

Federal Rules of Civil Procedure, Rule 10(c) 5, 27

Other Authorities

Chicago Board of Trade, Rule 183 25

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Respondent prays that the petition for a writ of certiorari be denied.

STATEMENT OF THE CASE

Preliminary Statement

The petition urges this court to grant a writ of certiorari for two reasons. First, the decision of the court below is purportedly at odds with the decision of this Court and other courts on the issue of arbitrator bias. Tamaris argue that the arbitration panel was biased because the employer of one of the seven (7) arbitrators hired a Bache employee who had testified as to perfunctory and uncontested matters at the arbitration hearings. Tamaris also argue that the arbitrators had a vested interest in deciding whether the Tamaris voluntarily agreed to arbitrate because the arbitrators were associated with the Chicago Board of Trade ("CBOT"). Secondly, Tamaris urge that the decision of the court below departed from the accepted and usual course of judicial proceedings by accepting as true statements appearing in exhibits to the complaint when the statements were purportedly inconsistent with well pleaded allegations.

Petitioners' statement of the case omits material facts concerning the issues presented and, further, contains inaccuracies. Respondent therefore respectfully submits the following statement of the case.

History of the Prior Litigation

In 1973, a dispute arose between Tamaris, the petitioners, and Bache, the respondent, concerning two commodity accounts maintained by Tamaris with Bache's branch office in Beruit, Lebanon. The Tamaris and Bache agreed to arbitrate their dispute before the "CBOT". Bache filed its arbitration complaint against Tamaris seeking recovery of the amount of a debit balance remaining in Tamaris' commodity accounts. Tamaris, in turn, filed an answer and also a counterclaim. The counter-

claim alleged that Bache mismanaged the accounts. An arbitration award was entered in favor of Bache and against the Tamaris covering the debit balance in the accounts, and Tamaris' counterclaim was dismissed (Pet. App. F, ¶¶ 11, 14, 59-60).

While the arbitration proceedings were pending, Tamaris filed a series of lawsuits and administrative proceedings against Bache. They filed complaints with the Commodity Futures Trading Commission and the CBOT Business Conduct Committee. They obtained no relief on either complaint. They also filed four separate lawsuits in the district court in an attempt to stay and overturn the arbitration proceedings on various grounds. Tamaris were denied relief in each of those lawsuits. The petition here concerns the fourth of these lawsuits. The lawsuits are described below.

The First Lawsuit-Tamari I

On December 10, 1975, the Tamaris filed their first lawsuit against Bache, entitled *Tamari, et al.* v. *Bache, et al.*, Case No. 75 C 4189 (N. D. Ill.). Their complaint alleged the same things their arbitration counterclaim alleged. In addition to money damages, the Tamaris requested an injunction enjoining Bache from "having the cause adjudicated in any other forum".

On April 21, 1976, the district court entered a preliminary opinion finding that Bache and the Tamaris had entered into a valid agreement to arbitrate their dispute and indicating that the Tamaris would be ordered to continue to arbitrate. On May 19, 1976, the district court entered an order which dismissed the action against Bache and ordered the Tamaris to arbitrate. On June 16, 1976, the Tamaris filed a notice of appeal from the May 19, 1976 order. That appeal was dismissed on September 23, 1976 on Tamaris' own motion to remand.

Tamari I is still pending against Bache & Co. (Lebanon) S. A. L., a foreign subsidiary of Bache.

The Second Lawsuit-Tamari II

On January 6, 1976, while their first lawsuit was pending, the Tamaris filed their second lawsuit against Bache entitled *Tamari, et al.* v. *Bache et al.*, Case No. 76 C 21 (N. D. Ill.). The CBOT was also named as a defendant.

The complaint alleged that the provision requiring arbitration in the customer's agreement that they had signed was invalid under 1974 amendments to the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, and under regulations subsequently adopted by the Commodity Futures Trading Commission ("CFTC"). Tamaris also urged that the CBOT lacked authority to arbitrate the dispute.

On May 19, 1976, the district court dismissed the action for failure to state a claim upon which relief could be granted. The district court's order was affirmed in *Tamari* v. *Bache & Co. (Lebanon) S. A. L.*, 565 F. 2d 1194 (7th Cir. 1977). In affirming, the Seventh Circuit held among other things: (i) that the 1974 amendments to the Commodity Exchange Act and the regulations adopted pursuant thereto did not invalidate Tamaris' agreement to arbitrate the dispute; and (ii) that Tamaris were required to arbitrate their dispute with Bache before the CBOT (Pet. App. G, pp. A62-67).

Tamaris' petition to this court for a writ of *certiorari* in Tamari II was denied, 435 U. S. 905 (1978).

The Third Lawsuit-Tamari III

On June 6, 1976, the Tamaris filed a third lawsuit entitled *Tamari, et al.* v. *Conrad, et al.*, Case No. 76 C 2071 (N. D. Ill.), involving the same subject matter as Tamari II. In Tamari III, the complaint named each of the individual arbitrators as defendants. Bache was granted leave to intervene.

On November 15, 1976, the district court dismissed the action. On April 12, 1977, the Seventh Circuit affirmed, *Tamari* v. *Conrad*, 552 F. 2d 778 (7th Cir. 1977).

The Present Case

The complaint in this fourth lawsuit sought to vacate the arbitration award entered against Tamaris and in favor of Bache. Transcripts of the arbitration proceedings were attached as an exhibit to the complaint and incorporated by reference (Pet. App. F, ¶ 32(s)). The district court dismissed the complaint for failure to state a claim upon which relief could be granted and the court below affirmed (Pet. App. A-D).

The Complaint

The allegations of the complaint, in so far as they are pertinent to the issues raised in the petition here, are as follows:

The Tamaris are citizens and residents of Lebanon. They are engaged in the business of importing and wholesaling food products in Jordan, Lebanon and other countries (April 18, 1976 Tr.* pp. 64-5). On May 20, 1972 and on September 22, 1972, respectively, the Tamaris opened two commodity accounts with Bache at Bache's branch office in Beruit, Lebanon. Upon opening the accounts, Tamaris executed customer agreements, which provided that Tamaris and Bache would arbitrate any dispute concerning the commodity accounts before the exchange on which the disputed trades were made *or* before the American Arbitration Association. Tamaris could choose the forum (Pet. App. F, ¶ 7; Complaint, Ex. A).

In 1973, a dispute arose between Tamaris and Bache. On January 9, 1974, Bache notified Tamaris that they owed it $376,366.96 (which was the amount of the debit balances in the Tamaris' accounts) and that Bache desired to arbitrate the matter. Bache requested Tamaris to elect either the New York Stock Exchange or the American Arbitration Association as the arbitration forum (Pet. App. F, ¶ 9; Complaint, Ex. D).

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* "Tr." refers to the arbitration transcripts of proceedings which were attached as an exhibit to the complaint. Under Rule 10(c), Federal Rules of Civil Procedure, a document "which is an exhibit to a pleading is a part thereof for all purposes."

Several days later, Tamaris notified Bache by telegram (Pet. App. F, ¶ 10; Complaint, Ex. E):

> "We accept arbitration in accordance with the terms of the customers agreement concluded with your principals stop Pursuant to Clause 14 of the said agreement we request that the arbitration should take place in accordance with the rules of the exchange where our commodities transactions took place namely the Chicago Board of Trade stop We further request that the arbitration proceedings should include a claim of two million one hundred and fifteen thousand US dollars. . . ."

On February 8, 1974, Bache filed its arbitration complaint against Tamaris seeking recovery of the amount of the debit balances remaining in their commodity accounts (Pet. App. F, ¶ 11).

On April 27, 1974, Tamaris executed a submission agreement in which they again agreed to arbitrate their dispute with Bache before the CBOT (Pet. App. F, ¶ 12; Complaint, Ex. G). The submission agreement provided in part:

> "CHICAGO BOARD OF TRADE
>
> Arbitration Form
>
> WHEREAS, Differences and controversies are now existing and pending between Bache & Co. Incorporated, and Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. in relation to business transactions.
>
> Now we, the undersigned Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. and Bache & Co. Incorporated aforesaid, desiring to avoid proceedings in the courts, do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present 'Committee of Arbitration' elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be. . . ."

On September 17, 1974, the Tamaris filed an answer and a counterclaim in the arbitration proceedings seeking in excess of

$2 million (Pet. App. F, ¶ 13). Shortly thereafter, in November, 1974, Tamaris and Bache met with legal counsel for the CBOT concerning procedural matters and discovery, and a discovery schedule was set (December 11, 1975 Tr. p. 45; January 26, 1976 Tr. pp. 22-24). The arbitrators subsequently met with the parties on October 16 and 30, 1975 concerning procedural matters, and the first evidentiary hearing was set for December 11, 1975. Later hearings were held on January 7, 1976, January 14, 1976, January 26, 1976, February 11, 1976, February 12, 1976, March 2, 1976, March 9, 1976, April 7, 1976, April 8, 1976 and May 17, 1976 (Pet. App. F, ¶¶ 18, 20 and 31).

At the start of the April 7, 1976 hearing, the arbitrators informed the parties that since the last hearing, Mr. Fivian resigned working for Bache and that he would in the near future go to work for Heinhold Company. Mr. Klopfenstein, an arbitrator, was a vice-president of Heinhold (April 7, 1976 Tr. pp. 1-2).

Fivian, a vice president of Bache working out of Bache's Chicago office, had testified before the arbitrators on February 11, 1976, February 12, 1976 and March 9, 1976. His testimony focused almost entirely on the identification of documents and the internal operation of Bache's office. Fivian appeared before the arbitrators to testify because he had been designated by Bache to respond on its behalf to Tamaris' subpoena to produce documents. He was not an occurrence witness. His testimony did not relate to disputed issues of material fact (February 11, 1976 Tr. p. 30; February 12, 1976 Tr. pp. 5-74; March 9, 1976 Tr. pp. 21-68; Pet. App. A, p. A6).

The arbitrators stated that if there was any objection to Klopfenstein's staying on the arbitration panel, he would withdraw. The arbitrators asked Tamaris if they wanted any background on the nature of the employment and afforded Bache and Tamaris a full opportunity to question both Klopfenstein and Fivian (April 7, 1976 Tr. p. 2).

In response to questions, Fivian stated that an executive search firm initiated the negotiations with Heinhold. Starting sometime in February, he had several negotiations with Heinhold management in DaKalb, Illinois. He had no conversations with Klopfenstein. He was hired on March 16, 1976 and was to start work on April 15, 1976. Bache was first notified of Fivian's new employment on March 29, 1976 (April 7, 1976 Tr. pp. 3-5). The arbitrators, without exception, first learned of Fivian's new employment on April 7, 1976 (April 7, 1976 Tr. pp. 4-5 and 14).

The arbitrators informed both parties that they had not discussed Fivian's testimony, that they had not made any decisions based upon Fivian's testimony, and that Klopfenstein thus had no influence on them with respect to Fivian's testimony. The arbitrators also added that they had not yet deliberated on the merits of the case and that the only decisions Klopfenstein participated in were procedural and in no case did he cast a deciding vote. They also pointed out that no procedural rulings were final. Klopfenstein withdrew from the arbitration panel on April 7, 1976 (Pet. App. A, pp. A4-5; April 7, 1976 Tr. pp. 10, 14-16; April 8, 1976 Tr. p. 52).

On April 8, 1976, the Tamaris and Bache presented extensive arguments concerning whether the arbitration should proceed. After hearing the arguments, the arbitrators decided to proceed. One of the Tamaris then proceeded to testify for the remainder of the hearing (Tr. April 8, 1976, p. 51 *et seq*).

At the start of the May 17, 1976 hearing, the Tamaris announced they would not continue to arbitrate. The only reason they gave was that the panel of arbitrators was allegedly improperly constituted under the submission agreement. The arbitrators advised Tamaris that they had jurisdiction over the matter and would rule on the case. They further stated that they had reached no decision on the merits of the case and that they would take further evidence to satisfy themselves on the

merits. The Tamaris walked out of the proceeding. Thereafter, the arbitrators questioned Mr. Reyes, who worked at Bache's Beruit office, as well as another Bache employee. They also received documentary evidence offered by Bache (May 17, 1976 Tr. p. 5, *et seq*).

On May 19, 1976, the district court entered orders in Tamari I and Tamari II ordering the Tamaris to arbitrate. Tamaris ignored the orders.

On June 21, 1976, the remaining six arbitrators in an unanimous decision entered an award in favor of Bache and against the Tamaris on both Bache's Complaint and Tamaris' Counterclaim (Pet. App. F, ¶ 59; Complaint Ex. Q). On June 28, 1976, the Tamaris appealed the award to the CBOT Committee on Appeals. On January 25, 1977, the Committee on Appeals affirmed the award (Pet. App. F, ¶ 60).

Bache's Motion to Dismiss and the District Court's Order

Bache moved to dismiss Tamaris' complaint for failure to state a claim upon which relief could be granted.

On February 26, 1979, the district court granted Bache's motion and filed a well-reasoned and thorough memorandum opinion (Pet. App. C). The district court held that Fivian's acceptance of employment with Heinhold Company, the employer of arbitrator Klopfenstein, did not suggest partiality on the part of the arbitrators. The district court said (Pet. App. C, p. A18):

> "The relationship between Mr. Klopfenstein and Bache, however, can hardly be considered to be 'more than trivial.' See *Commonwealth Coatings*, 393 U. S. at 152 (White, J., concurring). Mr. Fivian was not a party to the arbitration proceedings and would not appear to have any personal stake in the outcome of the arbitration. The only connection between Mr. Klopfenstein and Bache is that Mr. Klopfenstein's employer hired Bache's employee. We think that

> under these circumstances, nothing more was required than that the relationship between Mr. Klopfenstein and Bache be promptly disclosed to plaintiff. This was done. The arbitrator then withdrew from the panel and did not participate in making the award."

The district court further made an express finding that the arbitration proceedings were fair and impartial. The district court said (Pet. App. C, p. A23):

> "In dismissing plaintiffs' complaint, we would point out that a reading of the transcripts of the arbitration proceeding convinces us that both parties were accorded a fair, impartial and non-arbitrary forum in which to settle their dispute. Giving plaintiffs the benefit of all reasonable inferences, we do not believe their claim can stand in light of the record before us."

On April 10, 1979, the district court entered judgment on Bache's counterclaim and confirmed the arbitration award (Pet. App. D, pp. A25-27).

Tamaris' Motion to Vacate

Thereafter, Tamaris filed a motion to vacate the district court's orders dated February 26, 1979 and April 10, 1979. Tamaris also requested an opportunity to take discovery on the issue of arbitrator bias.

On August 3, 1979, the district court denied Tamaris' motion. The district court concluded that Tamaris were not entitled to discovery concerning Klopfenstein's involvement, if any, in the employment negotiations concerning Fivian, stating (Pet. App. E, p. A29):

> "We believe that whatever the extent of Klopfenstein's knowledge concerning the ongoing employment discussions, his relationship with a party to the arbitration proceedings, Bache, was never more than trivial."

Tamaris appealed the August 3, 1979 order to the court below.

The Decision of the Court Below

On April 25, 1980, the court below affirmed the district court's orders in a unanimous decision written by Circuit Judge Tone (Pet. App. A).

In reviewing the issue of alleged arbitrator bias, the court below adopted the district court's assessment that Tamaris had received a full and impartial hearing on their claim. (Pet. App. A, p. A5). The court also found that there was no appearance of bias. Judge Tone said (Pet. App. A, p. A5-6).

> "We also conclude that, even viewing the complaint in the light most favorable to the Tamaris, no claim has been stated that would warrant relief due to an appearance of bias. Fivian's negotiations with Heinhold were of necessity confidential until an agreement had been reached. When the decision was made, Fivian promptly disclosed it, and the Tamaris were promptly informed by the committee of what had occurred. Klopfenstein offered to withdraw and did withdraw in response to the Tamaris' request. Therefore, even assuming that Klopfenstein might reasonably appear to have had some nontrivial interest in the proceedings because his employer had hired the employee of a party, any appearance of bias was dispelled by the forthright manner in which the situation was handled once it became known. The record of the arbitration hearings, which controls insofar as it is in conflict with plaintiffs' complaint, is similarly devoid of any manifestation of partiality.
>
> It is relevant to the appearance of bias issue as well as the actual bias issue that Fivian was not an occurrence witness but rather Bache's delegate to produce documents and answer questions about the firm's operating procedures. His testimony did not relate to disputed issues of material fact, and the Tamaris have shown no prejudice to them even on the assumption that the arbitrators believed everything Fivian said in his testimony. Moreover, Fivian was negotiating to leave Bache and did so during the period in question. The possibility that Bache might have benefited from any indirect affinity that might have developed

between Fivian and Klopfenstein because of the new employment relationship is so remote that we think no reasonable person would find an appearance of bias in Bache's favor on this account."

The court also considered Tamaris' claim that the arbitrators were biased in determining whether Tamaris had voluntarily submitted to arbitration because they were associated with the CBOT. On this score, Judge Tone said (Pet. App. A, p. A10-11):

"There is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business. This is implicit in this court's decision in Tamari II; any other view would mean that Tamari II required a futile arbitration process before a panel that would in the end merely be found incompetent to hear the case due to bias or the appearance of bias. It is also to be noted that under the agreement to arbitrate the Tamaris had the choice of submitting to arbitration before either the CBOT or the American Arbitration Association. In addition, correspondence of record indicates that Bache offered the Tamaris a third option, submitting to arbitration before the Board of Governors of the New York Stock Exchange. The Tamaris' election to proceed before the CBOT gives a hollow ring to their argument of inherent bias or the appearance thereof in CBOT arbitrators.

Finally, if it were necessary to go further, we would find no indication in the record of the arbitration proceeding of actual bias on the part of the arbitrators; their decision that the Tamaris voluntarily agreed to arbitrate is reasonable in view of the record. Even if it were assumed that the Tamaris signed the original agreement to arbitrate under duress, because they could not otherwise obtain a commodity customer account with Bache, they did not make a timely assertion of agreement under duress when a dispute over the contract arose. Instead, they again agreed to arbitration by selecting the CBOT forum, by executing a submission to arbitration with Bache, and by actually proceeding to litigate the case before the arbitration committee.

> The committee could reasonably have determined that four agreements to arbitrate were sufficient to demonstrate voluntariness on the part of the Tamaris."

The court below concluded that the complaint was properly dismissed because even viewing the complaint in the light most favorable to Tamaris, no claim was stated. (Pet. App. A, p. A5, A13). In reviewing the complaint, the court below noted that exhibits attached to the complaint controlled inconsistent allegations "as the Tamaris recognize" (Pet. App. A, p. A4). In addition, the court noted Tamaris had a "full opportunity" to explore the Kiopfenstein-Fivian matter in the arbitration proceedings. (Pet. App. A, p. A13).

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT BELOW ON THE ISSUE OF CLAIMED ARBITRATOR PARTIALITY IS CORRECT AND IN CONFORMITY WITH THE DECISION OF THIS COURT AND OF OTHER COURTS

The primary reason Tamaris advance for granting a writ is that the decision of the court below on the issue of arbitrator partiality is purportedly at odds with this Court's decision in *Commonwealth Coatings Corporation* v. *Continental Casualty Company*, 393 U. S. 145 (1968) and with a decision of the Second Circuit in *Sanko S. S. Co. Ltd.* v. *Cook Industries, Inc.*, 495 F. 2d 1260 (2d Cir. 1973). Tamaris' argument simply ignores that the facts in each of these cases vastly differ from those present here. The decision of the court below is consistent with those cases, and, in fact, is implicitly mandated by *Commonwealth Coatings.*

A. Tamaris' Argument That the Arbitrators Were Partial Because an Arbitrator's Employer Hired a Bache Employee Who Testified at the Arbitration Hearings Lacks Merit

Tamaris first argue that there was an appearance of partiality in the arbitrators because the *employer* of arbitrator Klopfenstein hired Fivian, a Bache *employee* who testified on perfunctory matters at the arbitration hearings. In that regard, the court below noted (i) the possibility that Bache may have benefited from any indirect affinity that might have developed between Fivian and Klopfenstein was so remote that "no reasonable person would find an appearance of bias in Bache's favor on this account"; (ii) when Fivian was hired, the Tamaris were

promptly advised, Klopfenstein offered to withdraw, and the matter was handled in a forthright manner; and, (iii) Klopfenstein withdrew from the panel and did not participate in making the award which was unanimously rendered by the remaining six arbitrators.

Against this record, the court below held that no claim was stated which would warrant relief due to an appearance of arbitrator partiality. In so ruling, the court below was well aware of *Commonwealth Coatings* and *Sanko*. Judge Tone said (Pet. App. A, pp. A6-7):

> "Nothing in *Commonwealth Coatings* or in the other cases relied on by the Tamaris would support a contrary result. These cases involve the failure to disclose relationships that might reasonably give rise to an appearance of partiality; in each of them an arbitrator with a significant connection to a party participated in an award. In the case at bar, the relationship was never significant, and the arbitrator disclosed it at the first opportunity and withdrew."

An examination of *Commonwealth Coatings* and *Sanko* and an examination of the record in this case amptly demonstrates that the court below was preeminently correct.

1. Unlike Commonwealth and Sanko, the Arbitrator Had No Relationship to a Party. If One Existed Here, It Was Trivial at Best

Tamaris' petition mischaracterizes the facts and holding of *Commonwealth Coatings*. In that case, the parties to a dispute each appointed one arbitrator, and those two then selected a third, supposedly "neutral" arbitrator. The neutral arbitrator owned a business and acted as an engineering consultant on construction projects. His relation with the prevailing party in the arbitration was described as follows (393 U. S. at 146):

> "One of his *regular customers* in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic

> in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between then for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's *patronage was repeated and significant,* involving fees of about $12,000 over a period of four or five years, and *the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit.*" (Emphasis supplied)

This Court held that this arbitrator/party business relation, which was secreted during the arbitration proceedings, gave rise to an appearance of bias. In so holding, Mr. Justice Black, speaking for a plurality of four, said:

> "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might *reasonably be thought biased against one litigant and favorable to another.*" (Emphasis supplied).

In a concurring opinion, Mr. Justice White, joined by Mr. Justice Marshall, noted that arbitrators were effective because "they are men of affairs, not apart from but of the marketplace." Because of this, arbitrators are not automatically disqualified by an undisclosed relationship with a party before them if ". . . the relationship is trivial. I see no reason to disqualify the best informed and most capable potential arbitrators," 393 U. S. at 151.

In *Sanko,* the plaintiff alleged that the only "neutral" arbitrator on the three man panel failed to disclose two relationships he had with the prevailing party: one, that the arbitrator's company regularly retained the attorney who represented the prevailing party in the arbitration; and two, that the arbitrator's ultimate employer had large scale dealings running into millions of dollars with the prevailing party. The court noted there were contested versions of facts concerning these relationships and directed the district court to hold an evidentiary hearing. In so ruling, the court noted that (495 F. 2d at 1264, n. 3):

> "Whether ties are so indirect or remote that they could not reasonably create an impression of bias is a question that must be answered by reference to the facts of the particular case."

It is readily apparent that the relationship here is vastly different from those present in *Commonwealth Coatings* and *Sanko*. Here, the arbitrator Klopfenstein did not have a "repeated and significant" business arrangement with Bache, nor did he have any personal involvement "on the very (matters) involved in this lawsuit". Klopfenstein, in fact, had no business dealings with Bache; he had no contact whatever with Bache; he had no personal stake or interest in the outcome of the arbitration. Nor did Klopfenstein's employer have any business relationship or contact with Bache.

The only relationship at issue here is that Fivian, a Bache employee who testified on perfunctory matters at the arbitration proceeding, interviewed for a job with the employer of arbitrator Klopfenstein. In so doing, Fivian did not even talk to Klopfenstein. Fivian's interviews were purely personal and solely for his individual concern; they did not involve or contemplate any future business relation between Bache and Klopfenstein or his employer; they were totally unrelated to the subject matter of the arbitration. There is simply no basis to conclude from these particular facts that Klopfenstein "might reasonably be thought biased" against Tamaris and in favor of Bache.

Tamaris urge that the court below adopted a standard with which to evaluate a claim of arbitrator bias, a standard which they claim is at odds with *Commonwealth Coatings*. The standard referred to is that before an award may be set aside on grounds of arbitrator bias, the bias "must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." This standard is sound and reasonable. It is consistent with the plurality opinion in *Commonwealth Coatings* that before an award may be set aside, there must be a business relation from which an arbitrator "might reasonably be thought

biased" in favor of one party and against the other. It is consistent with Mr. Justice White's concurring opinion in which he made clear that an arbitrator is not automatically disqualified if an arbitrator's "business relationship" with a party is "trivial." It is also consistent with *Sanko's* conclusion that an examination of whether an arbitrator's relation with a party is "indirect or remote" turns on the particular facts of a case.

Moreover, the court below held "no reasonable person would find an appearance of bias", the relationship was "never signficant" and the "possibility of bias was highly speculative." (Pet. App. A, pp. A 6-7). Whatever standard is applied, the result would be the same. No claim has been stated which would warrant relief due to an appearance of arbitrator bias. This result is consistent with, if not mandated by, *Commonwealth Coatings* and *Sanko;* it is supported by numerous decisions of other courts. *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.,* 439 F. 2d 1268, 1275 (2d Cir. 1971); *Andros Compania Maritima S. A.* v. *Marc Rich & Co., A. G.,* 579 F. 2d 691, 697-702 (2d Cir. 1978); *United States Wrestling Federation* v. *Wrestling Division of the A. A. U. Inc.,* 605 F. 2d 313, 318 (7th Cir. 1979); *Isaacson* v. *Hayden, Stone Inc.,* 359 F. Supp. 1050, 1052 (S. D. N. Y. 1973); *Oversees Private Inv. Corp.* v. *Anaconda Co.,* 418 F. Supp. 107, 111 (D. C. 1976); *Ilios Shipping and Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.,* 148 F. Supp. 698, 700 (S. D. N. Y. 1957).

2. Unlike Commonwealth Coatings and Sanko, the Relation at Issue Here Was Promptly Disclosed

In *Commonwealth Coatings,* Mr. Justice Black said (393 U. S. at 147-8):

> ". . . we have no reason, *apart from the undisclosed* business relationship, to suspect him (the arbitrator) of any improper motive. But neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years." (Emphasis supplied)

Arbitrator bias thus reasonably appeared in *Commonwealth Coatings* because the business relationship was concealed throughout the arbitration proceedings. Similarly, there was no disclosure in *Sanko*.

Here, Fivian was hired by arbitrator Klopfenstein's employer on March 16, 1976. Bache was advised on March 29, 1976. The arbitrators, without exception, were advised on April 7, 1976. The arbitrators promptly advised the parties of the matter at the April 7, 1976, hearing which was the first hearing after the hiring took place. Mr. Klopfenstein volunteered to withdraw. The arbitrators offered both Bache and Tamaris an opportunity to ask whatever questions they desired concerning the matter. Mr. Klopfenstein withdrew at Tamaris' request and did not thereafter participate in the taking of evidence or in making the award.

The six arbitrators handled the matter properly and fairly, and having done so the award may not be set aside. *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1275 (2d Cir. 1971).

3. Unlike Commonwealth Coatings and Sanko, the Challenged Arbitrator Here Withdrew and Did Not Participate in Making the Award

Klopfenstein withdrew as an arbitrator on April 7, 1976, and he did not participate in the arbitration hearings thereafter had, nor in the making of the award. The arbitration award was unanimously made on June 21, 1976 by the remaining *six* arbitrators (Pet. App. F, ¶ 59; Complaint, Ex. Q). There is thus no basis to claim that the *award* is tainted by evident partiality or corruption of the arbitrators.

Moreover, it should be noted that procedural decisions made during the course of the arbitration were not tainted in any way. The arbitrators had not discussed Fivian's testimony, had not made any decisions based on Fivian's testimony, and Klopfen-

stein had not influenced any arbitrator with respect to Fivian's testimony. In addition, the arbitrators had not yet deliberated on the merits of the case; the only decision Klopfenstein participated in were procedural, and, in no case did he cast a deciding vote. At the time Klopfenstein withdrew, no procedural decisions were final. The record thus does not even permit an inference that procedural decisions were tainted.

B. Tamaris' Argument That the Arbitrators Had a Vested Interest in Determining Whether They Voluntarily Submitted to Arbitration Lacks Merit

Tamaris also argue that the arbitrators were biased in deciding whether Tamaris submitted to arbitration voluntarily. Tamaris cite CFTC Reg. 180.3 as support for their proposition that the commodity futures industry has a vested interest in compelling arbitration. From there they argue that the arbitrators here, who were associated with the CBOT, had this purported vested interest. Tamaris' argument lacks merit for a number of reasons, any one of which requires its rejection.

1. Tamaris' Argument Is Not Supported by Allegations of the Complaint and Was Not Raised in the District Court

The complaint does not allege that the arbitrators were partial because they had a vested interest in compelling arbitration, nor did Tamaris argue this in the district court. The argument may not be raised here. *Usery* v. *Turner Elkorn Mining Co.*, 428 U. S. 1, 37 (1976); *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801, 808 (1948).

2. Tamaris' Argument Is Barred by Res Judicata

Tamaris' argument that the arbitrators were partial in deciding whether they voluntarily submitted to arbitration was finally adjudicated in Tamari II (Pet. App. G). In that case, Tamaris argued that the provisions requiring arbitration in their

customers' agreement were invalid as adhesion contracts and invalid under provisions of the Commodity Exchange Act, as amended, and under CFTC Reg. 180.3. They also argued that their submission to arbitration was involuntary. The Seventh Circuit rejected those arguments and held that the Tamaris were required to arbitrate before the CBOT. The Seventh Circuit thus adjudicated that the agreement for arbitration was not tainted by fraud or coercion, that the arbitrators were qualified to decide the case and implicitly held that the arbitrators were not inherently biased simply because they were associated with the CBOT (Pet. App. G, pp. A62-67).

Tamaris are now barred from relitigating the matter on theories which were raised or which could have been raised in Tamari II. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 597 (1948), *Angel* v. *Bullington,* 330 U. S. 183, 193-4 (1946).

3. Tamaris Waived Any Purported Partiality

The crux of Tamaris' argument is that the arbitrators were partial not because of a relation with Bache, but because of their association with the commodities industry. The overriding flaw in this argument is that Tamaris knew all along that an arbitration before the CBOT would be conducted by arbitrators associated with the commodities industry. Mr. Justice White's concurrence in *Commonwealth Coatings* makes clear (393 U. S. at 150):

> "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance."

Here, Tamaris knew in advance of the arbitrator's relationship they now belatedly claim evidences partiality. There is no basis under *Commonwealth Coatings* to disqualify the arbitrators on this ground. Accord: *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1275 (2d Cir. 1971);

Garfield & Co. v. *Wiest*, 432 F. 2d 849, 853 (2d Cir. 1970) *cert. denied* 401 U. S. 940 (1971); *Andros Compania Maritima S. A.* v. *Marc Rich & Co., A. G.*, 579 F. 2d 691, 701 (2d Cir. 1978).

The Tamaris not only knew that the arbitrators were associated with the commodities industry, but the Tamaris themselves in fact *elected* to arbitrate their claim before the CBOT. The Tamaris had the option of electing to arbitrate any dispute with Bache before the American Arbitration Association *or* the exchange on which the trades giving rise to the dispute were made. After the dispute arose, Bache asked Tamaris to choose between the American Arbitration Association or the New York Stock Exchange. Tamaris informed Bache "we accept arbitration in accordance with the terms of the customer agreement . . . we request that the arbitration should take place in accordance with the rules of exchange where our commodities transactions took place namely the Chicago Board of Trade."

Subsequently, on April 27, 1974, Tamaris executed an arbitration submission agreement in which they again agreed to arbitrate before the CBOT; on September 17, 1974 they filed an answer and counterclaim in the CBOT arbitration proceedings; later they participated in procedural discovery and evidentiary hearings in connection with the arbitration. The record discloses that Tamaris not only knew the arbitrators were associated with the CBOT, but that they, not *Bache*, elected to arbitrate before the CBOT. As the court below noted:

> "There is no inherent bias or appearance of bias in the arbitration panel simply because its members were drawn from persons in the commodities business. This is implicit in this Court's decision in *Tamari II;* any other view would mean that *Tamari II* required a futile arbitration process before a panel that would in the end merely be found incompetent to hear the case due to bias or the appearance of bias. It is also to be noted that under the agreement to arbitrate the Tamaris had the choice of sub-

> mitting to arbitration before either the CBOT or the American Arbitration Association. In addition, correspondence of record indicates that Bache offered the Tamaris a third option, submitting to arbitration before the Board of Governors of the New York Stock Exchange. The Tamaris' election to proceed before the CBOT gives a hollow ring to their argument of inherent bias or the appearance thereof in CBOT arbitrators." (Pet. App. A, pp. A10-11)

Tamaris now claim that they attended the arbitration hearings only after they filed a lawsuit against Bache on December 10, 1975. This, however, does nothing to unravel and render void some four agreements to arbitrate (including several post-dispute agreements to arbitrate), entered into more than a year earlier.* Tamari I and Tamari II so held. Moreover, the day after Tamaris filed their first lawsuit against Bache, Tamaris' counsel said at the arbitration hearings (December 11, 1975 Tr. pp. 17-18 and 22):

> "In response to Mr. Giambalvo, with respect to the request for arbitration, his original request for arbitration to the Tamaris was that it be held before either the New York Stock Exchange Arbitration Committee or the American Arbitration Association. We responded that it should be held before the Chicago Board of Trade Arbitration Committee. That was our request.
>
> * * *
>
> "I have no feeling about this Arbitration Committee that it wouldn't give a fair hearing on this. I don't have any problem with that at all. As a matter of fact, this was the forum that I originally selected, that my clients selected when Mr. Giambalvo's client was suggesting that it be the New York Stock Exchange or the American Arbitration Association."

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* Section 2 of the United States Arbitration Act provides that a written provision for arbitration ". . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U. S. C. § 2.

Tamaris' belated argument that they did not waive any claimed partiality that may have arisen by reason of the arbitrators' association with the CBOT is belied by the record.

4. An Appearance of Partiality Cannot Be Inferred from the History of Commodities Futures Trading Commission Regulation 180.3

Tamaris urge that an inference that the arbitrators were partial in deciding whether Tamaris voluntarily submitted to arbitration may be drawn from the history of CFTC Reg. 180.3. This argument lacks merit for a number of reasons.

First, CFTC Reg. 180.3 does not suggest or infer in any way that arbitrators associated with a commodities exchange might be partial. Any such notion is dispelled by the fact that the Commodity Exchange Act, as amended, requires commodity exchanges to provide a procedure through arbitration or otherwise to settle customer claims, 7 U. S. C. § 7(a)(11). Congress has thus concluded that a commodity exchange can fairly and impartially resolve customer disputes through arbitration.

Secondly, CFTC Reg. 180.3 pertains only to pre-dispute agreements to arbitrate and it was adopted out of a concern that unsophisticated persons might not understand the import of an arbitration clause; it has no application whatever to agreements to arbitrate entered into *after* a dispute has arisen. Here, Tamaris are sophisticated businessmen, engaged in the business of importing and wholesaling food products in international commerce. Furthermore, with the benefit of advice from their attorneys they agreed to arbitrate on several occasions *after* their dispute with Bache arose and they elected to arbitrate before the CBOT. As Circuit Judge Tone held (Pet. App. A, p. A11):

> "Finally, if it were necessary to go further, we would find no indication in the record of the arbitration proceeding of actual bias on the part of the arbitrators; their

> decision that the Tamaris voluntarily agreed to arbitrate is reasonable in view of the record. Even if it were assumed that the Tamaris signed the original agreement to arbitrate under duress, because they could not otherwise obtain a commodity customer account with Bache, they did not make a timely assertion of agreement under duress when a dispute over the contract arose. Instead, they again agreed to arbitration by selecting the CBOT forum, by executing a submission to arbitration with Bache, and by actually proceeding to litigate the case before the arbitration committee. The committee could reasonably have determined that four agreements to arbitrate were sufficient to demonstrate voluntariness on the part of the Tamaris."

CFTC Reg. 180.3 thus has no application here. This is particularly so in light of the fact that Tamari II held that the regulation did not preclude the arbitration and further held that Tamaris were required to arbitrate before the CBOT.

Thirdly, CBOT Rule 183 provides that "[T]he policy of the Association is to encourage, but not to compel, the arbitration of disputes." In light of this, there is no basis whatever to infer that the arbitrators were predisposed to hold that Tamaris had voluntarily submitted their dispute to arbitration.

Finally, it should be noted that Section 2 of the Arbitration Act provides that a written provision for arbitration ". . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U. S. C. § 2. Tamari II adjudicated that there were no grounds upon which the arbitration agreement could be revoked and held that Tamaris were required to arbitrate. In light of Tamari II, it is altogether unclear what remained for the arbitrators to decide on any issue of voluntariness and whether it is an issue of any legal consequence.

II.

TAMARIS' ARGUMENT THAT THE COURT BELOW SO DEPARTED FROM ACCEPTED COURT PROCEDURES IN DISMISSING THEIR COMPLAINT FOR FAILURE TO STATE A CLAIM AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION LACKS MERIT

Tamaris argue that the holding of the court below is premised on findings which are inconsistent with well-pleaded allegations of the complaint. Tamaris urge that the court below should not have accepted as true Fivian's statement that he did not talk to arbitrator Klopfenstein and Vanasco's statement that the arbitrators assured themselves no prejudice would occur if the arbitration proceeded.

Tamaris also claim that the court below somehow erred in holding that nothing in the record showed bias or prejudice resulting from Bache's hiring of the CBOT Secretary during the arbitration proceedings. The argument here seems to be that Tamaris might be able to bolster a concededly deficient complaint.

Tamaris' argument concerning the construction of their complaint lacks merit for a number of reasons, any one of which standing alone requires its rejection.

A. The Court Below Concluded Tamaris Failed to State a Claim Viewing the Allegations Most Favorably to Tamaris

The court below was well aware of the rule to be applied in examining the sufficiency of pleadings on a motion to dismiss. The court stated "even viewing the complaint in the light most favorable to the Tamaris, no claim has been stated that would warrant relief due to an appearance of bias" (Pet. App. A, p. A56). Tamaris' suggestion that the court below ignored this principle in rendering its decision is unfounded.

B. It Is Settled Law That an Exhibit to a Complaint Controls Inconsistent Allegations

Mr. Fivian was sworn in under oath at the arbitration hearings. On April 7, 1975, Tamaris' counsel asked him:

> Q. "Did you have any conversations with Mr. Klopfenstein during this period of negotiations?"
> A. "No."

The arbitration transcripts were attached to Tamaris' complaint as an exhibit and were incorporated by reference. Under Rule 10(c), Federal Rules of Civil Procedure, they became a part of the complaint for all purposes. Under settled law, they control inconsistent allegations of the complaint, a principle Tamaris conceded in the court below. *In re Woodmar Realty Co.*, 294 F. 2d 785, 788 (7th Cir. 1961), *Associated Builders Inc.* v. *Alabama Power Company*, 505 F. 2d 97, 100 (5th Cir. 1974); *Olpin* v. *Ideal National Insurance Company*, 419 F. 2d 1250, 1255 (10th Cir. 1969), *cert denied*, 397 U. S. 1074 (1970). This rule is particularly applicable here in light of the facts that (i) Fivian's statement was made after he was sworn in under oath at the arbitration hearings, (ii) Tamaris had a full opportunity to examine him, and (iii) the inconsistent allegations of the complaint are vague and conclusory.

The same applies to Vansasco's statement that the Committee assured itself that no prejudice would occur if the arbitration proceeded. This statement was made in the context of other specific statements by Vansasco and the chairmen of the arbitration panel, none of which are inconsistent with well-pleaded allegations of the complaint (Pet. App. A, pp. A4-5). Even assuming an inconsistency, the court below could properly take Vansasco's statement into account in concluding that the complaint failed to state a claim of arbitrator bias.

C. The Holding of the Court Below Does Not Turn on the Findings Tamaris Complain of

Tamaris erroneously assume that Fivian's statement that he did not talk to arbitrator Klopfenstein is a pivotal issue to the holding of the court below. Tamaris ignore that even assuming Fivian had talked to arbitrator Klopfenstein, arbitrator Klopfenstein's relation with Bache would still be trivial at best. The district court concluded that:

> "whatever the extent of Klopfenstein's knowledge concerning the ongoing employment discussions, his relationship with a party to the arbitration proceedings, Bache, was never more than trivial."

Similarly, the court below held whatever affinity might have developed between Klopfenstein and Fivian, no reasonable person would find an appearance of bias in favor of Bache on this account (Pet. App. A, p. A6). Further, the court below, noted that Fivian's hiring was promptly disclosed, and that arbitrator Klopfenstein immediately withdrew and did not participate in making the award. The holding of the court below concerning the issue of arbitrator bias is thus supported by a number of grounds and does not turn on whether Fivian talked to Klopfenstein.

Likewise, Tamaris suggest that Vanasco's statement was the sole basis in the record to conclude that Tamaris received a fair and impartial arbitration hearing. Here, Tamaris ignore that that decision of the court below also quotes statements of Chairman Newman in this regard, none of which are challenged by Tamaris. Tamaris also ignore the fact that the court below adopted the assessment of the district court, which was based on a review of all the arbitration transcripts of proceedings, that Tamaris "were accorded a fair, impartial and non-arbitrary forum" (Pet. App. A, pp. A4-5).

Finally, the court below rejected Tamaris argument concerning Bache's hiring of the CBOT Secretary on a series of grounds which Tamaris choose to ignore (Pet. App. A, pp. A7-9).

D. The Dismissal of Tamaris' Complaint Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

The court below correctly noted that a court's power to vacate an arbitration award is limited to the grounds set forth in 9 U. S. C. § 10 (Pet. App. A, p. A2, n. 2). In reviewing the complaint, it viewed the allegations most favorably to Tamaris. In treating exhibits to the complaint as controlling over inconsistent allegations, it did so in light of prior authority and upon Tamaris' recognition of the well-settled rule in the court below. Furthermore, Circuit Judge Tone specifically noted that Tamaris had a full opportunity to develop facts relative to the Klopfenstein/Fivian matter (Pet. App. A, p. A4).

The court below acted correctly with respect to the matters Tamaris raise here. Its holding is supported on numerous grounds independent of those grounds Tamaris urge here. It did not so depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

III

THE ISSUES RAISED ARE BARRED BY RES JUDICATA AND WAIVER

As noted above, pp. 20-1, Tamari II has finally adjudicated issues raised in Tamaris' petition.

In addition, after Tamaris began to present evidence in support of their counterclaim at the arbitration proceedings, they walked out of the proceedings. The only reason assigned for their walk-out was that the panel was illegally constituted. Nothing was said concerning arbitrator bias (May 17, 1976 Tr. p. 5). Having premised their walk-out on that reason, Tamaris waived all other claims including any claim of evident partiality in the arbitrators.

As stated by this court in *Ohio & Mississippi Railway Company* v. *McCarthy*, 96 U. S. 258, 267-8 (1878):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has begun, change his ground, and put his conduct upon another and a different consideration."

Tamaris' petition should be denied because the issues they raise are barred by *res judicata* and waiver.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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